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No. 91-1873

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Supreme Court of the United States

OCTOBER TERM, 1991

VIRGIN ATLANTIC AIRWAYS, LTD., MARIO BATISTA, LAWRENCE FRENCH, JULIO ROSA, JOSE MARCELLO GARCIA, JOHN AQUINO, and EDGAR LAMBERTUS,

Petitioners,

—v.—

NATIONAL MEDIATION BOARD, an agency of the United States of America, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 851, ANTHONY FARINA, individually and as president of Local 851, INTERNATIONAL BROTHERHOOD OF TEAMSTERS AIRLINE DIVISION, WILLIAM GENOESE, individually and as Director of International Brotherhood of Teamsters Airline Division,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

MICHAEL DELIKAT
Counsel of Record
JILL L. ROSENBERG
ORRICK, HERRINGTON & SUTCLIFFE
599 Lexington Avenue
New York, New York 10022
(212) 326-8800

Attorneys for Petitioners

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PETITIONERS' REPLY BRIEF

Petitioners[1] respectfully submit this reply brief in further support of their petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit in order to address arguments raised by the National Mediation Board "NMB" or the "Board") in its Brief in Opposition ("NMB Br.").

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1 Petitioners respectfully refer the Court to the previously filed Petition for a Writ of Certiorari for a description of Petitioner Virgin Atlantic Airways, Ltd.'s parent companies and subsidiaries.

ARGUMENT

1. Although the NMB seeks to label this case as a "routine representation dispute" (NMB Br. at 5) between a carrier and the NMB, this case goes to the heart of the majority representation principle of the Railway Labor Act, 45 U.S.C. § 151 et seq. ("RLA" or "the Act"). Section 2, Fourth of the Act, 45 U.S.C. § 152, Fourth, provides that the majority of employees of a carrier shall have the right to determine whether that craft or class will be represented by a union. The NMB has, by its actions in this case, violated that principle by granting outcome determinative power to four individuals who were not "employees" of the carrier within the meaning of the RLA and thereby certifying a union where a majority of Virgin Atlantic employees did not vote for such representation. Judicial review of NMB actions is necessary to, at a minimum, protect this fundamental rule of majority choice. Simply put, does the NMB have the authority to give voting rights to individuals who indisputably are not "employees" within the meaning of the RLA?

2. Contrary to the NMB's suggestion (NMB Br. at 6-9), there are clear limits to the Board's powers in investigating and processing a representation dispute under Section 2, Ninth of the Act, 45 U.S.C. § 152, Ninth. These limits are highlighted by the Ninth Circuit's recent decision in *America West Airlines v. National Mediation Board*, No. 90-16337, 1992 U.S. App. LEXIS 15216 (9th Cir. July 7, 1992). In that case, the Ninth Circuit upheld jurisdiction to review the Board's decision to send a "special notice" to participants in a rerun election which declared unlawful actions of the carrier relating to the initial election. Contrary to the NMB's position that the Board's election procedures were not subject to review, the court reviewed the NMB's actions and ruled that the NMB had acted in excess of its statutory powers by distributing the notice. The court rejected the Board's contention that it could conduct an election in any way it saw fit, stating that "the Board errs in its assumption that its discretion in choosing the means to conduct a representation investigation is unfettered." *America West*,

1992 U.S. App. LEXIS 15216 at *12. As in *America West*, a federal court should have jurisdiction to determine whether certain actions taken by the NMB in the course of conducting an election in this case violated the Board's statutory authority.

Moreover, even the board concedes that *America West* stands for the proposition that the Court can review an action of the NMB where the Board "step[s] out of the role assigned to it by Congress." (NMB Br. at 9.) Here, Congress has authorized the Board in Sections 2, Fourth and Ninth of the RLA to conduct elections only of "employees" defined in Section 1, Fifth, 45 U.S.C. § 151, Fifth, as persons "in the service of a carrier." The Board "steps out" of that role when it intentionally grants outcome determinative voting power to individuals who are indisputably not "employees" within the meaning of the Act.

3. The Board also claims, relying on *Leedom v. Kyne*, 358 U.S. 184 (1958), that to obtain judicial review, it must be shown that the Board acted in excess of its statutory authority *and* contrary to a specific statutory prohibition. However, the Board's reliance on *Kyne* is misplaced. Courts have consistently declined to adopt the NMB's argument asserted here that judicial review is limited to violations of the RLA that are expressly negative in nature. *See America West*, 1992 U.S. App. LEXIS 15216 at *12; *Professional Cabin Crew Ass'n v. NMB*, 872 F.2d 456, 460 n.2 (D.C. Cir.), *cert. denied*, 110 S. Ct. 497 (1989).

Moreover, such a reading of the Act attempts to avoid the literal language as well as the intent of both the statute and regulations. Section 2, Ninth of the Act, 45 U.S.C. § 152, Ninth, expressly limits the Board's authority to conducting elections of "employees." Additionally, NMB Rule 1206.06, 29 C.F.R. § 1206.06, which qualifies Section 2, Ninth, permits only dismissed employees with *pending* reinstatement actions to participate in elections. Rule 1206.06 thus excludes from eligibility dismissed employees without pending reinstatement actions. This exclusion is confirmed by the NMB's Manual (35a-36a) which *expressly* states that such individuals *shall not be* considered eligible to participate in an election. Finally,

Section 2, Fourth, 45 U.S.C. § 152, Fourth, explicitly decrees that the majority of the relevant class or craft of employees shall determine issues of representation. Thus, judicial review is required since the NMB herein has "attempted [an] exercise of power that [has] been specifically withheld." *Kyne*, 358 U.S. at 189.

4. In defending its decision to ignore the ruling of the district court dismissing the reinstatement action of the four discharged individuals, the NMB argues that it is the Board's "policy" to preserve the status quo as of the original count date when the count has been delayed for some reason. However, the cases relied on by the NMB to support this proposition are inapposite. For example, in *Continental Airlines*, 14 N.M.B. 131 (1987), voter eligibility was preserved as of the date the ballots were impounded where the count was put off due to a pending bankruptcy proceeding. Similarly, in *Altair Airlines*, 7 N.M.B. 489 (1980), eligibility was preserved as of the date ballots were originally impounded where the count was postponed to resolve allegations concerning election conduct. In contrast to this case, the counts in those cases were postponed for reasons unrelated to critical issues of voter eligibility.

In *Trans World Airlines*, 13 N.M.B. 220 (1986), also cited by the NMB, the Board denied the carrier's motion for reconsideration of an earlier Board ruling that flight attendants working in another class and craft as of the count date were ineligible to vote, and in so doing, refused to extend the eligibility date to the date the NMB decided the carrier's motion, even though the ballot count had been delayed and the ballots impounded due to the unresolved eligibility issue. In that case, the Board's decision to maintain the status quo as of the original count date was sound since the delay could have affected the eligibility of persons not subject to the specific eligibility challenge made by the carrier.

In the instant case, the ballot count was delayed by the NMB specifically to determine the eligibility of the four discharged individuals. If the Board intended to maintain the status quo as of the original count date (April 25, 1988), its decision to delay

the ballot count in order to determine the discharged workers' eligibility was a completely meaningless one since there would have been no change in voter eligibility of the four discharged workers prior to April 25, given that the district court would not be ruling on the reinstatement claims until at least April 26.

5. The absence of an established NMB status quo policy is further evidenced by the NMB's attempt to "explain away" its April 19, 1988 telex (43a) granting Virgin's request for a postponement of the April 25, 1988 ballot count and its April 26, 1988 telex (83a-84a) reversing the April 19 ruling. The NMB suggests (NMB Br. at 3-4) that the April 19 telex was intended to reserve final determinations of eligibility (such as a ruling on the status of Michael Wilson) until the NMB officials returned from an out-of-town conference and that upon their return, such determinations were made via the April 26 telex. However, the April 26 telex made absolutely no findings with regard to Mr. Wilson's eligibility and on April 27, Virgin's counsel informed the NMB of that fact (93a-94a). Mr. Wilson's eligibility was not addressed by the NMB until the actual ballot count on April 27.

Contrary to the NMB's position today, the only possible interpretation of the NMB's April 19 telex is that which is clear on its face—that the NMB had granted Virgin's request to postpone the ballot count until all eligibility questions had been resolved, including those to be decided by the district court in the reinstatement action. The NMB's efforts in this case to create and then defend an illusory policy further underscore the need for meaningful judicial review of the NMB's arbitrary actions in this and other cases.

CONCLUSION

For the reasons set forth herein and in the Petition, Petitioners respectfully submit that a writ of certiorari be granted to review the decision below.

Dated: New York, New York
September 22, 1992

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE

Michael Delikat
Counsel of Record
Jill L. Rosenberg
Attorneys for Petitioners
599 Lexington Avenue
New York, New York 10022
(212) 326-8800